UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KIMBERLY KENNEDY,

Plaintiff,

vs.

CAROLYN W. COLVIN, *acting Commissioner of Social Security*,

Defendant.

CASE NO. 13cv1632-WQH(KSC)

REPORT AND RECOMMENDATION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

[Doc. Nos. 16, 23]

Pursuant to Title 42, United States Code, Section 405(g) of the Social Security Act ("SSA"), plaintiff Kimberly Kennedy ("plaintiff") filed a Complaint on July 12, 2013 to obtain judicial review of a final decision by the Commissioner of Social Security ("defendant") denying her claim for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI").[1] This case was referred for a Report and Recommendation on the parties' Motions for Summary Judgment. [Doc. No. 4; *See* 28 U.S.C. § 636(b)(1)(B)] After considering the moving papers [Doc.

[1] Title 42, United States Code, Section 405(g), provides as follows: "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party ... may obtain a review of such decision by a civil action ... brought in the district court of the United States.... The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner ... as to any fact, if supported by substantial evidence, shall be conclusive."

Nos. 16, 23, 24 (Duplicate), 26], the Administrative Record [Doc. No. 10], and the applicable law, the Court **RECOMMENDS** that plaintiff's Motion for Summary Judgment [Doc. No. 16] be **DENIED**, and that defendant's Cross Motion for Summary Judgment [Doc. No. 23] be **GRANTED**.

I. PROCEDURAL HISTORY

Plaintiff filed applications for a period of disability, DIB, and SSI on June 16, 2010, alleging disability beginning on November 1, 2008. [Administrative Record (AR) at 213-228] After defendant denied plaintiff's applications at both the initial and reconsideration levels [AR at 120-27, 130-36], plaintiff appeared with her attorney before Administrative Law Judge ("ALJ") Leland Spencer on April 9, 2012 in San Diego, California. [AR at 24-71] ALJ Spencer heard testimony from plaintiff, medical expert Eric C. Puestow, M.D., and vocational expert John P. Kilcher. *Id.* Based on the testimony and the documentary evidence, on April 17, 2012, the ALJ issued his written decision, finding that plaintiff was not disabled under sections 216(i) and 223(d) of the SSA. [AR at 10-18] The ALJ's finding that plaintiff was not disabled became defendant's final decision on May 17, 2013, when the Appeals Council declined plaintiff's request for review. [AR at 1-5]

II. RELEVANT FACTS

A. Background

Plaintiff was born on October 16, 1959. [AR at 296] She completed school up through the 11th grade and is able to communicate in English. [AR at 246-48] Plaintiff's past work experience includes the occupations of assistant deli manager, bartender, administrative clerk, and truck rental agent. [AR at 248] Her positions of assistant deli manager and bar tender required standing, walking, bending, kneeling, crawling, reaching, pushing, pulling, lifting up to 50 pounds, squatting, climbing, overhead work, and grasping. [AR 256-59] Her positions of administrative clerk and truck rental agent required both sitting and standing, walking, climbing, stooping, kneeling, crouching, grasping, pushing, pulling, and lifting between 30 and 50 pounds.

[AR 260-61] Plaintiff complains of chronic back pain, gastrointestinal issues, kidney disease, and bladder/bowel problems. [AR at 247] Plaintiff claims these problems caused her difficulty at work, most notably severe back pain from being on her feet at her last job of bartender. *Id.* In an Exertional Daily Activities Questionnaire completed by plaintiff on July 7, 2010, she states that she lives with a friend and that her average day consists of sleeping, walking, and some chores, but that her constant pain hinders all of these activities and her ability to leave the house. [AR at 253-55]

B. Medical Evidence

1. Desert Oasis Medical Center (2007 - 2010)

From 2007 to 2010, plaintiff visited Desert Oasis Medical Center numerous times presenting with a myriad of symptoms and complaints, most commonly back pain and gastrointestinal issues, but also including hemorrhoids and skin irritation on her arms and face. [AR 459-88] On August 24, 2007, plaintiff presented to this facility for the first time complaining of anxiety, bruising to her ribs caused by a recent fall, diarrhea, and a lump on the back of her left leg. [AR at 471] She advised that she was in the process of separating from her spouse. *Id.* Plaintiff admitted to smoking 1 and ½ packs of cigarettes per day and drinking alcohol, but denied using illicit drugs. *Id.* The treating physician referred her to a surgeon for the lump, to a gynecologist for an annual check-up, and prescribed Lopramide for the diarrhea. [AR at 472]

On December 27, 2007, plaintiff appeared for a follow-up presenting with a mild rash, sore throat, and chronic diarrhea. [AR at 469] At that point, plaintiff had still not presented to a gynecologist as previously referred. *Id.* Plaintiff was prescribed Benadryl for the rash, a Z-Pack for the sore throat, and given Loperamide for the diarrhea. *Id.* She was again advised to schedule an appointment with a gynecologist and referred to a gastroenterologist. *Id.*

On July 10, 2008, plaintiff again presented with anxiety, and advised that she was in the midst of divorce proceedings. [AR at 466] Plaintiff stated that Xanaz helped with anxiety in the past, and wanted to try it again. *Id.* Additionally, she complained

of a generalized rash, acid reflux, and chronic diarrhea. *Id.* However, she failed to see a gastroenterologist, as referred in December of 2007. *Id.* She was prescribed Xanax for anxiety, Prilosec for acid reflux, and referred to Dr. Singh for the diarrhea. *Id.*

On March 25, 2009, plaintiff complained of anxiety and acid reflux and sought refills of her Xanax and Prilosec, stating that she recently regained insurance coverage. [AR at 465] Plaintiff denied any abdominal pain, diarrhea, or urinary complaints. *Id.* She also sought a referral to her gynecologist, Dr. Borchers. *Id.* The prescriptions were filled and the referral was made as requested. *Id.*

On April 16, 2009, plaintiff presented as a walk-in patient to the clinic as a follow-up to a recent emergency room visit. [AR at 467] Plaintiff had been seen and treated in the ER the previous day with kidney stones, hematuria, and abdominal pain. *Id.* After being given three medications in the ER, she woke up the next day with an itchy rash. *Id.* All three medications were discontinued, and replaced with Bactrim, Atarax, and an injection to relieve the itching. *Id.* Plaintiff was referred to Dr. Azher for the kidney stones. *Id.*

On January 22, 2010, plaintiff and "her significant other" appeared in the clinic, complaining of itching on her arms and face. [AR at 463] She denied any pain in her abdomen, back, or joints. *Id.* Her alcoholism and tobacco addition were identified as contributing factors. [AR at 463-64] Plaintiff presented again on April 15, 2010 for a follow-up. [AR at 461] Due to a fight a couple of weeks prior, bruising appeared on her right breast area. *Id.* However, she denied any chest pain, abdominal pain, diarrhea, or urinary complaints. *Id.* Plaintiff sought an increase in her Xanax dosage, as the current amount prescribed was no longer providing relief. *Id.* Her Xanax prescription was increased, and a referral made for hemorrhoids. [AR at 461-62]

On June 8, 2010, plaintiff presented with back pain and acid reflux, seeking medication for both. [AR at 460] This came shortly after her discharge from the hospital on June 4, 2010, to which she was admitted for 10 days for sepsis and anemia starting on May 26, 2010. *Id.* She was advised to continue the medicines proscribed

in May, and diagnosed with alcoholic liver disease and anxiety. *Id.* She was prescribed Ultram, Soma, and Zantac for the back pain and ordered to return in one month with a completed blood test. *Id.*

On July 14, 2010, plaintiff presented complaining of a burning sensation while urinating. [AR at 485] Bactrim was prescribed and plaintiff was again advised to get a blood test, something she failed to do following her June 8, 2010 visit. *Id.*

The Court notes that on a number of plaintiff's visits in 2010, she denies any back or abdominal pain. [AR at 461, 463, 485]

2. Western Arizona Regional Medical Center (2009 - 2010)

On April 14, 2009, plaintiff presented to the emergency room chiefly complaining of severe flank pain, diarrhea, nausea, and vomiting. [AR at 447] Plaintiff advised medical staff of her history of kidney stones and that she recently experienced burning with urination that had since resolved. *Id.* A CT scan of her abdomen and pelvis revealed no acute findings. [AR at 448] Plaintiff was diagnosed with kidney stones, but feeling much better one hour into the visit, she was discharged with instructions and a variety of prescriptions. [AR at 449] On June 10, 2009, plaintiff presented in the emergency room with sudden onset of lesions. [AR at 443] Plaintiff was diagnosed with elevated liver enzymes, and instructed not to drink alcohol or take Aspirin. *Id.*

On May 26, 2010, plaintiff was taken to the emergency room by ambulance and admitted after being found unconscious on the floor of her domicile. [AR 330-440] Upon initial physical examination, her vital signs were normal, there was no evidence of external trauma, her heart rate and rhythm were normal, and she had normal range of motion in her extremities. [AR at 371] Upon regaining consciousness, plaintiff explained that she had been experiencing flu-like symptoms and fell and hit her head, causing her to lose consciousness. [AR at 357] Plaintiff denied any chest pain, but complained of incontinence. *Id.* CT scans were taken of her head, thoracic spine, abdomen, and pelvis, an MRI was taken of her brain, and an X-Ray taken of her chest.

[AR at 423-30] While some mild abnormalities were discovered, nothing acute was identified in these scans. More specifically, no "acute intracranial pathology" was discovered in her head scans, and "[n]o evidence of acute or active cardiopulmonary disease" presented in the lungs. [AR at 440, 435] However, mild cerebral atrophy was discovered in her brain, and a mildly enlarged kidney in her abdomen. [AR at 437, 432] Examination of lung fields were clear and stable, showing only a pattern of bronchitis. [AR at 434] She was diagnosed with septicemia and a urinary tract infection, kept under close watch, and treated with a broad spectrum antibiotic. [AR at 340, 357] Plaintiff was discharged on June 4, 2010, after 10 days in the hospital. [AR at 330]

3. Tri-City Medical Center (2010)

On December 16, 2010, plaintiff presented to the emergency department complaining of a sore throat, high fever, cough, chills, ear pain, and general body aching. [AR at 519-30] At the time of her admission, she was not experiencing any vomiting, nausea, labored breathing, or any other alarming displays. [AR at 519] Plaintiff's daughters expressed concern because of plaintiff's prior admission for sepsis on May 26, 2010. [AR at 520-21] "Because [plaintiff] is immune compromised by her alcoholism it is felt that she should be treated vigorously with antibiotics to make sure that this does not recur...." [AR at 521] Plaintiff responded well to hydration and antibiotics. *Id.* She was diagnosed with a sore throat and a urinary tract infection and discharged the same day. [AR at 525]

On September 16, 2011, plaintiff arrived at the emergency room with a change in mental status and was admitted for further evaluation. [AR at 549] Specifically, plaintiff's parents brought her in because plaintiff appeared confused and sleepy. [AR at 551] During intake, plaintiff reported that she was an alcoholic and that it had been roughly 1 year since she had consumed alcohol, when she was hospitalized for septic shock. *Id.* Plaintiff also complained of head, neck, and back pain. [AR at 560] She was diagnosed with a urinary tract infection, hepatic encephalopathy, and cirrhosis of liver (alcohol-induced). [AR at 549] All symptoms resolved after treatment with

lactulose and antibiotic. *Id.* Plaintiff was discharged three days later, on September 19, 2011. *Id.*

4. Michael Chipman, D.O. - Consultative Examiner (orthopedist) (2010)

On August 17, 2010, Dr. Chipman examined plaintiff, and reviewed her medical records to date in advance of the exam, for the purpose of completing a Social Security Disability Evaluation. [AR at 499-502] On the date of examination, plaintiff's chief complaints were of back pain and bowel/bladder problems. [AR at 499] Plaintiff was able to ambulate in the room, get on and off the table, and take her slip-on shoes on and off without assistance or difficulty. [AR at 500] Dr. Chipman conducted a physical exam and tested plaintiff's range of motion and muscle strength, noting that the x-ray of the lumbar spine shows "minimal degenerative changes and no evidence of acute pathology." [AR at 500-01] Thus, Dr. Chipman opined that plaintiff's condition would not impose a limitation for 12 continuous months. [AR at 501]

5. Doris Javine, Ph. D. - Consultative Examiner (psychchologist) (2010)

On August 19, 2010, Dr. Javine, a clinical psychologist, conducted a 1 hour and 15 minute examination of plaintiff. [AR at 503-07] Dr. Javine noted that plaintiff drove to the interview, arrived on time, was appropriately dressed and with a cooperative and pleasant attitude, with sores on her face and leg, and appearing older than her stated age of 50 years. [AR at 503] Plaintiff asserted that she is unable to work because she cannot stand for "longer than like thirty minutes without [her] kidney[]s hurting. . . . [and she cannot] sit [for] longer than fifty minutes [before] they start bothering [her]." *Id.* Dr. Javine noted that her speech was mildly slurred and that she appears to have problems retrieving words, making her mildly difficult to understand. [AR at 504] Plaintiff reported managing her own finances, knowing how to use a computer, showering every other day, brushing her teeth daily, and dressing without the assistance of others. *Id.* Dr. Javine subjected plaintiff to a battery of scenarios meant to test the following categories: orientation, recall, memory, intelligence, calculation, abstract thinking, similarities and differences, and judgment. [AR at 505-05]

Dr. Javine noted that while plaintiff exhibited difficulty with serial 3's, she was capable of counting backwards from 20 and there were no other cognitive difficulties displayed. [AR at 507] More specifically, Dr. Javine found that plaintiff had no limitations in the following three areas: (1) ability to understand and remember simple instructions, locations, and work-like procedures; (2) social interactions; and, (3) responding appropriately to changes in the work setting or in responding to hazards. [AR at 508] However, plaintiff was noted as having "mild" impairment in concentration and persistence. *Id.* Dr. Javine concluded by opining that plaintiff "will likely be unable to manage awarded benefits responsibly and in her best interest." [AR 507-08]

6. Sarah Shepherd, D.O. - Consultative Examiner (orthopedist) (2010)

After reviewing plaintiff's medical records to date in advance, on February 13, 2011, Dr. Shepherd examined plaintiff for the purpose of completing a Social Security Disability Evaluation. [AR at 533-38] On the date of the examination, plaintiff complained of pain in her right hip, right knee, and generalized pain "body wide." [AR at 533] Plaintiff described the hip pain as constant, throbbing, aching, and only relieved when she moves her right leg around. [AR at 533] She described the knee pain as being triggered by her hip pain, and stated that she has fallen numerous times due to unsteadiness on her right leg. *Id.* In a typical day, plaintiff is able to sleep eight to ten hours a day, take her medication, straighten up her room, do stretching exercises, wash dishes, do laundry, and do some grocery shopping. [AR at 534] Plaintiff reported Soma, Tramadol, Xanax, and Ranitidine as her current medications, and denied smoking, but admitted to alcohol use. *Id.*

Upon physical examination, plaintiff was pleasant and cooperative, able to sit and walk comfortably and without difficulty, but smelled of alcohol. *Id.* Dr. Shepherd found plaintiff to have good strength and full range of motion in her joints and extremities. [AR at 535] As a result of these findings, Dr. Shepherd found that plaintiff's complaints of subjective pain in her right hip, right knee, and "body wide"

were all without objective clinical correlation. [AR at 536] Thus, Dr. Shepherd opined that plaintiff's condition would not impose a limitation for 12 continuous months. *Id.*

7. Cynthia McKinney, M.D. (2011)

On April 1, 2011, plaintiff presented as a new patient to the Vista Community Clinic for the purpose of establishing a plan of care for her chronic back pain and abdominal pain. [AR at 603-23] Dr. McKinney received a thorough social and medical history from plaintiff. Among other items revealed during intake, plaintiff stated she is a recovering alcoholic who, prior to 2010, consumed approximately 4 drinks of hard alcohol per day. [AR at 604] Plaintiff had recently moved from Arizona and sought a refill of her medications. [AR at 603] A physical examination revealed normal findings, including plaintiff's back which was described as "non-tender." [AR at 605] In addition, a battery of blood tests and labs was ordered. *Id.* Plaintiff brought certain hospital records, specifically from her emergency room stay in Arizona in May of 2010, when she was admitted after being found unresponsive at home and diagnosed with sepsis triggered by a urinary tract infection. Dr. McKinney instructed plaintiff that her most recent medical records needed to be produced and reviewed before most of the desired medications could be refilled. *Id.* In addition, plaintiff was advised that she would be required to sign an "Initial Pain Contract Eval[uation]" before any narcotic medications would be prescribed, and only after her prior records were received and reviewed and the medications were deemed appropriate. *Id.*

On April 13, 2011, plaintiff presented for a follow-up on the labs taken at her prior visit. [AR at 600-01] The labs showed evidence of chronic alcohol abuse, which was confirmed in the records received from Arizona. [AR at 600] Dr. McKinney discussed scheduling a CT scan of plaintiff's liver to evaluate its function so as to determine the next step for treatment of her liver disease. [AR at 601]

On April 27, 2011, plaintiff saw Dr. McKinney for the purpose of being evaluated for pain medications. [AR at 596-99] Plaintiff continued to complain of chronic low back pain, but Dr. McKinney notes that "we still don't have records from

her last [primary care physician] in [Arizona] (the medical records release form that [plaintiff] filled were for the hospital)." [AR at 596] Dr. McKinney commented that plaintiff had already been told that "no narcotics would be dispensed without previous records being available and reviewed." *Id.* Plaintiff presented as "anxious" and with an "irritable affect." [AR at 597] More directly, Dr. McKinney specifically noted that "plaintiff became [q]uite [u]pset when she was told (again) that she would not be [receiving] narcotics as stated above. She was advised to sign a records release - this time for her [primary care provider] in Arizona and she will be referred to Pain Management for eval[uation] [and] treatment." *Id.*

On May 31, 2011, plaintiff again saw Dr. McKinney. [AR at 586-92] Plaintiff was again upset when she did not receive Norco, as she represented she received it from her previous medical care provider; however, Dr. McKinney noted that she thoroughly read plaintiff's prior records from Arizona and there was no mention of any narcotics being given to plaintiff anywhere. [AR at 586] Plaintiff calmed down after Dr. Kinney communicated this, and was content to stay on Tramadol. *Id.* An MRI of the spine revealed nerve root compression with central canal stenosis. *Id.* She was referred to a pain management specialist to see what, if anything, could be done for the pain. [AR at 585] A physical examination revealed mostly normal findings, with the exception of posterior tenderness in the spine, paravertebral muscle spasms, and bilateral thoracic and lumbosacral tenderness. [AR at 588] Dr. McKinney noted that plaintiff has an "inappropriate affect," is "anxious, exhibits compulsive behavior, is paranoid, has poor insight, [and] exhibits poor judgment." *Id.* Plaintiff was diagnosed with chronic pain, spinal stenosis of lumbar region, alcoholic cirrhosis of the liver, anxiety, and an unspecified alcohol dependence. [AR at 588-89] Dr. McKinney prescribed Tramadol and Xanax, stated her intent to refer plaintiff to a neurosurgeon, and advised plaintiff to keep her appointment with the Pain Clinic. *Id.*

On October 5, 2011, plaintiff presented to the emergency department for chronic pain. [AR at 580-83] Dr. McKinney noted that plaintiff had been seeing providers

"outside of [Vista Community Clinic] [seeking] refills of narcotics according to her CURES report. [Plaintiff was] told that she has broken her pain management contract and will no longer be able to receive care at VCC due to this (after a month's grace period for urgent care needs not including pain meds)." [AR at 581] A prescription for Tramadol was refilled for her that day with no further instructions. *Id.*

8. William Weissman, M.D. (2011)

On May 16, 2011, plaintiff presented at Vista Community Clinic as a repeat patient with pain management issues. [AR at 593-95] She sought refills of pain medications previously prescribed in Arizona, but was having difficult finding old medical records. [AR at 593] Specifically, she stated that she had been given a prior prescription for Norco, but was unable to provide records of the same. *Id.* A taking of her vital signs and physical examination yielded normal findings, with moderate pain associated with motion in the cervical spine and lumbar spine. [AR at 594] Dr. Weissman refilled plaintiff's prescriptions for Tramadol, Soma, and Xanax, but required more information from her if she sought a Norco prescription. *Id.* Although typically seen by Dr. Cynthia McKinney, who also practices at the Vista Community Clinic, plaintiff saw Dr. Weissman on this occasion. *Id.*

On September 12, 2011, Dr. Weissman completed an examination of plaintiff, as well as a Physical Medical Source Statement. [AR at 545-48] Leading up to his completion of the Medical Source Statement, Dr. Weissman indicated that plaintiff had been visiting Dr. McKinney at the Vista Community Clinic monthly for the last nine months, presenting with severe and constant neck and back pain, which lead him to diagnose her with spinal stenosis, lumbar and cervical pain, muscle spasms, and chronic pain. [AR at 545] As to how plaintiff's impairments might impact her ability to work, Dr. Weissman asserted that plaintiff may become drowsy, dizzy, or experience nausea as a result of her medications. *Id.* In addition, Dr. Weissman opined that plaintiff's impairments have lasted or can be expected to last at least 12 months, and that emotional factors contribute to the severity of her symptoms and functional

limitations. *Id.* Specifically, Dr. Weismann identified depression and anxiety as contributing psychological conditions. [AR at 546]

Given all of these impairments, Dr. Weissman estimated plaintiff's functional limitations if placed in a competitive work situation as follows: she could sit for no more than 30 minutes before needing to get up; could stand for zero minutes before needing to sit down or walk around; in an 8-hour workday, could sit and stand for less than 2 or those 8 hours; could rarely lift and/or carry 10 pounds, and never lift or carry anything more; could never twist, bend, crouch, squat, or climbs stairs or ladders; could never use her arms, hands, or fingers to twist, finely manipulate, or reach overhead, but could reach in front of her body 20% of the time during an 8-hour workday. [AR at 546-47] Given these limitations, Dr. Weissman stated that plaintiff needs a job that permits her to shift positions at will from sitting, standing, and walking positions, and that plaintiff must be permitted to walk every 90 minutes for at least 1 minute. [AR at 546] Dr. Weissman also opined that plaintiff will need to take numerous unscheduled breaks during a normal workday, estimating at least 20 such breaks per day. *Id.*

Dr. Weissman estimated that 25% or more of plaintiff's average workday would be spent "off task," meaning with symptoms severe enough to interfere with the attention and concentration needed to perform even simple work. [AR at 548] Given all of these issues, Dr. Weissman stated his belief that plaintiff is incapable of tolerating even "low stress" work because she is in "constant severe pain" and her impairments are likely to produce "all bad days" and no good days. *Id.*

9. County of San Diego Mental Health Services (2011)

On October 19, 2011, plaintiff was seen for an Initial Screening with the following symptoms: depression, crying spells, anxiety, anhedonia, poor appetite, trouble sleeping, and paranoia. [AR at 624-40] She was seen by Dr. Paula Proffitt. Plaintiff denied any suicidal or homicidal tendencies, and denied any domestic violence or current substance abuse. [AR at 626-27] Plaintiff's drug screening, however, was positive for benzos, opiates, THC, and another stimulant. [AR at 632] Plaintiff later

admitted to occasional THC use and stated that she has some Xanax at home. *Id.* Plaintiff disclosed three previous DUI convictions, spanning from 1983 to 1985. [AR at 628] Based on the symptoms discussed and observed at the initial screening, and because plaintiff already qualified for the County's Low Income Health Program (LIHP), Dr. Proffitt found plaintiff met the medical necessity required for treatment, prescribed Celexa, referred plaintiff to NCHC - Encinitas for continued care, provided referrals for low cost counseling, and supplied crisis hotline numbers. [AR at 629-31]

III. ALJ HEARING AND DECISION

A. Plaintiff's Testimony

At the April 9, 2012 hearing before ALJ Spencer, plaintiff testified regarding her work history, which included a combination of bar tending, convenience store management, clerical, and customer service. [AR at 28-31] Based on plaintiff's descriptions, almost all of her occupations, even the ones appearing more sedentary in nature by job title, involved lifting, carrying, bending, and other physically strenuous demands. *Id.* Plaintiff last worked in the summer of 2008, as a bartender at O'Leary's. [AR at 31-32] She stopped working due to a broken right clavicle, suffered when she was knocked down a flight of stairs in her home by three of her large dogs. [AR at 31-33] Plaintiff stated she attempted to work after that injury, but was unable to function because of "excruciating" and "horrible" pain in her right shoulder. [AR at 32] The pain was especially impairing given that she is right handed. *Id.* As of the date of the hearing, plaintiff stated that chronic pain, stiffness, and numbness in her lower back, upper neck, legs, feet, arms, and hands render her unable to sit or stand for prolonged periods of time and thus, unable to work. [AR at 33, 43] Plaintiff described the pain as daily and usually the same, but sometimes spiking in intensity. [AR at 48] Plaintiff stated that her pain is the worst in her lower back and neck. [AR at 48] Her lower back pain pre-dated her clavicle injury, something she noticed when engaging in heavy lifting (cases of beer, kegs, etc.) as a bartender. [AR at 34] When pressed on the issue, however, plaintiff was unable to estimate, differentiate, or identify the timing,

sequence, or origin of each particular ailment. *Id.*

As of the date of the hearing, plaintiff reported to living in a house and asserted that she did seek employment after November of 2008. [AR at 35] Specifically, she applied online for customer service jobs and other similar jobs that did not involve lifting. *Id.* She estimated that she last looked for work in December of 2011, but qualified that she has not seen anything "out there" that would fit with her physical limitations. [AR at 41-42] Given her limitations, plaintiff stated she needs a job that will allow her to sit or stand at will, and estimated that she can lift no more than 10 pounds, can sit for no longer than 30 minutes at a time, and can stand on her feet for no longer than 25 minutes at a time. [AR at 36]

She reported that she lives with a friend, and despite having a license, she has not driven a vehicle for roughly two years, explaining that she gets "unfocused" because the "pain's so bad." [AR at 37-38] Instead, she relies on friends and family regularly, and public transportation occasionally. [AR at 38] On a typical day, plaintiff gets out of bed, takes a shower, reads, and "piddle paddle[s] around the house," stating "there's really not a whole lot I can do" and describing it as a "struggle." [AR at 39] Plaintiff has no pets, is not active with any group or association, and cites walking around the house and walking one block to the mailbox every other day as her only regular exercise. [AR at 39-40] Plaintiff reports being able to shop, cook, and keep her living space clean. [AR at 40]

Regarding plaintiff's history of alcohol abuse, she stated the last time she had a drink was in late May 2010, but that she is not active in any sort of recovering alcoholic support organization. [AR at 44-46] Plaintiff reported that she is limited in the number and types of pain medications she can take, because of the severe reactions she has had to them given her damaged liver. [AR at 47] Further, plaintiff indicated that depression and anxiety are daily issues for her, specifically that she is "always stressing out and thinking about just how [her] life has changed and how many things [she] can't do - - - things [she] used to do." *Id.* As to her difficulty focusing, plaintiff

reports that the intense pain causes her to lose her train of thought easily. [AR at 48]

Plaintiff testified that the last time she saw a doctor for pain management was in 2011, since her liver is unable to process most of the pain medications they prescribe. [AR at 49] Plaintiff also testified that she was "thrown out" of a program at Vista Community Clinic (a federally funded clinic) because she had seen a doctor outside of that clinic, but denied that charge and testified to following all clinic rules and directions. [AR at 50]

B. The Written ALJ Decision

On April 17, 2012, ALJ Spencer issued a written decision denying plaintiff's claim for DBI and SSI, finding that plaintiff was not disabled within the meaning of the SSA. [AR at 10-18] First, he concluded that plaintiff had not engaged in substantial gainful activity since the date of the alleged onset of disability, November 1, 2008. [AR at 12] At step two, the ALJ found plaintiff suffered from the following "severe" impairments, as defined in the Regulations: degenerative disc disease and stenosis of the lumbar spine. [AR at 12, citing 20 C.F.R. §§ 404.1520(c) and 416.920(c)] Also at step two, the ALJ found plaintiff suffered from cirrhosis of the liver due to alcohol abuse, but found there was no evidence to suggest the disorder would result in more than minimal limits and that it therefore did not qualify as a severe impairment. [AR at 13] At step three, however, plaintiff was found to have no impairment, or combination thereof, that met or equaled an impairment listed under 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.925, 404.920(d), 416.925, and 416.9296. [AR at 13] Specifically, the ALJ found: "No physician has opined that the [plaintiff's] condition meets or equals any listing, and the state agency program physicians opined that it does not." *Id.*

In assessing plaintiff's residual functional capacity ("RFC") at step four, plaintiff was deemed capable of lifting or carrying 10 pounds frequently and 20 pounds occasionally; needed the opportunity to alternate between sitting and standing every 30 minutes; sit for no more than a total of 4 hours in an 8-hour workday; stand for no

more than a total of 4 hours in an 8-hour workday; occasionally bend, stoop, crawl, climb, kneel, and balance; and, avoid hazards. [AR at 13, 17] Considering this RFC and the testimony from medical expert Eric Puestow, M.D. and vocational expert John Kilcher, the ALJ found plaintiff incapable of performing any of her past work as a bartender, clerk, truck rental agent, and assistant deli manager. [AR at 16] Notwithstanding her limitations, considering plaintiff's age, education, work experience, and RFC, the ALJ found at step five that jobs exist in significant numbers in the national economy that plaintiff is capable of performing, specifically as an assembler, packager, and garment sorter. [AR at 17] While the ALJ found that plaintiff's above-mentioned impairments could reasonably be expected to cause the alleged symptoms, he found plaintiff's "statements concerning the intensity, persistence and limiting effects of these symptoms" not credible to the extent they are inconsistent with his RFC assessment. [AR at 20]

IV. LEGAL STANDARDS

A. Evaluating SSI and DBI Claims

To qualify for DBI or SSI benefits under the Social Security Act, an applicant must show that he or she is unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that has lasted or can be expected to last at least 12 months or cause death. 42 U.S.C. §§ 423(d), 1382. The Social Security Regulations set out a five-step process for determining whether a person is disabled within the meaning of the SSA. *See* 20 C.F.R. §§ 404.1520(a), 416.920(a); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999); *Batson v. Comm'r of the Social Security Admin.*, 359 F.3d 1190, 1194 (9th Cir. 2004). If a party is found to be "disabled" or "not disabled" at any step in the sequence, there is no need to consider subsequent steps. 20 C.F.R. § 416.920.

First, the ALJ must determine whether the applicant is engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not, then the ALJ must determine whether the applicant is suffering from a "severe" impairment within

the meaning of the Regulations. *Id.* If the impairment is severe, the ALJ must then determine whether it meets or equals one of the "Listing of Impairments" in the Regulations. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the applicant's impairment meets or equals a Listing, the ALJ must then determine whether the applicant retains the residual functional capacity ("RFC") to perform his or her past relevant work. *Id.* If the impairment does not meet or equal a Listing, the ALJ must determine whether the applicant retains the residual functional capacity to perform his or her past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If the applicant cannot perform past relevant work, the ALJ–at step five–must consider whether the applicant can perform any other work that exists in the national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

While the applicant carries the burden of proving eligibility at steps one through four, the burden at step five rests on the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). Applicants not disqualified at step five are eligible for disability benefits. *Id.*

1. Substantial Evidence

The SSA provides for judicial review of a final agency decision denying a claim for DIB or SSI. 42 U.S.C. § 405(g). A reviewing court must affirm the denial of benefits if the agency's decision is supported by substantial evidence and applies the correct legal standards. *Id.*; *Batson*, 359 F.3d at 1193. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). When the evidence is susceptible to more than one reasonable interpretation, an agency's otherwise reasonable decision must be upheld. *Batson*, 359 F.3d at 1193. Where, as here, the Appeals Council denies a request for review, the ALJ's decision becomes the final agency decision that the court reviews. *Id.* at 1193 n.1.

2. Allocating Weight to Medical Opinions

When presented with conflicting medical opinions, the ALJ must determine

credibility and resolve the conflict. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). Greater weight must be given to the opinion of treating physicians, and in the case of conflict, "the ALJ must give specific, legitimate reasons for disregarding the opinion of the treating physician." *Id.* However, this does not mean the treating physician's opinion is dispositive. To the contrary, no physician's opinion is binding "with respect to the existence of a claimant's impairment or the ultimate determination of disability." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Instead, an ALJ is to weigh the medical opinion evidence as a whole, considering the entire record. 20 C.F.R. § 404.1527. Further, an ALJ should not give controlling weight to a treating physician's opinion of limitations unless it is "well-supported" and "not inconsistent" with other substantial evidence in the record. *Id.* at (d)(2).

3. Credibility of Claimant

In deciding whether to credit a party's testimony about subjective symptoms or limitations, the ALJ must engage in a two-step analysis. *Batson*, 359 F.3d at 1196; *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). First, the party must produce objective medical evidence of an underlying impairment that could reasonably be expected to produce pain or other symptoms. *Batson*, 359 F.3d at 1195; *Smolen*, 80 F.3d at 1281. If this test is satisfied, and there is no affirmative defense that the party is malingering, then the ALJ must determine the credibility of the party's subjective complaints. *See Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006). In assessing the credibility of a party's subjective complaints, the ALJ may consider such factors as the party's reputation for truthfulness, daily activities, and any inconsistencies in the statements. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Smolen*, 80 F.3d at 1284. While the ALJ must not disregard a party's testimony about the severity of pain solely due to a lack of substantiation by objective medical evidence, Congress expressly prohibits granting disability benefits based solely on a party's subjective complaints. *See Robbins*, 466 F.3d at 883; 42 U.S.C. § 423(d)(5)(A)("An individual's statement as to pain or other symptoms shall not alone

be conclusive evidence of disability."). An ALJ's credibility finding must be properly supported by the record and sufficiently specific to ensure a reviewing court that he or she did not "arbitrarily discredit" a party's subjective testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

V. DISCUSSION

The ALJ's analysis at steps 1 through 4 is not in dispute. The ALJ provided specific and legitimate reasons for the weight apportioned to the testimony, opinions, and medical records presented during and in advance of the hearing. Additionally, the ALJ's discussion of the entire record, including reasons plaintiff states in support of her position, reflects that the ALJ did consider the record as a whole. *See Gallant v. Heckler*, 753 F.2d 1450, 1455-56 (9th Cir. 1984) (in determining existence of substantial evidence a reviewing court must consider both evidence that supports and detracts from ALJ's conclusion). The ALJ methodically evaluated plaintiff's testimony, the opinions of the treating physicians, the testimony and opinions of medical and vocational experts, and plaintiff's entire medical record in arriving at his conclusion regarding plaintiff's RFC. To the extent that the RFC articulated by the ALJ conflicts with the opinions of Dr. Weissman or plaintiff's subjective complaints, the ALJ provided clear and convincing reasons for rejecting both the subjective claims and the opinions. Thus, the ALJ's findings at steps 1 through 4 are supported by substantial evidence and are free of legal error.

Plaintiff does not challenge the RFC or the ALJ's evaluation of the medical evidence or her credibility. Rather, she only challenges the ALJ's reliance on the vocational expert's testimony in finding that plaintiff was still capable of performing a significant number of jobs in the national economy. Specifically, plaintiff contends that the ALJ erred by (1) failing to include all of plaintiff's limitations in his hypothetical to the vocational expert; (2) failing to apply a sedentary base grid to plaintiff given the significant erosion to the light vocational base; and, (3) relying on testimony that is inconsistent with other jobs data noticed by defendant. For the

reasons outlined in greater detail below, none of the alleged deficiencies warrant reversal of the ALJ's written decision and findings.

A. The Hypothetical Posed to the Vocational Expert

Plaintiff argues that the ALJ erred in relying on the testimony of vocational expert John Kilcher because of a discrepancy between plaintiff's limitations as posed in a hypothetical scenario by the ALJ to Mr. Kilcher during the hearing, and the actual limitations ultimately recognized and established by the ALJ in his written decision. [Doc. No. 16-1, p. 10] Specifically, whereas the ALJ ultimately found that plaintiff could, *inter alia*, "sit for no more than a total of 4 hours in an 8-hour workday," the hypothetical scenario presented to and assumed by Mr. Kilcher during the hearing was one where plaintiff could, *inter alia*, sit for *more than 4* hours per workday. The discrepancy regarding plaintiff's ability to stay in a seated position is the only difference between the limitations recognized in the ALJ's written decision and the hypothetical presented to the vocational expert at the hearing. Plaintiff contends that this was an incorrect hypothetical scenario, that Mr. Kilcher developed a vocational opinion regarding the availability of jobs fitting plaintiff's limitations based off this incorrect assumption, and that the ALJ relied on this vocational opinion in arriving at his ultimate conclusion. Based on this Court's reading of the administrative record, the hearing at issue, the ALJ's written decision, and the relevant occupations identified by Mr. Kilcher, there is no evidence to suggest that this inconsistency impacted the ALJ's ultimate determination, let alone prejudiced plaintiff in any way.

The ALJ's hypothetical contained an incorrect clause stating plaintiff was capable of sitting for more than 4 hours in a workday. The hypothetical also contained a clause permitting plaintiff to alternate between sitting and standing as regularly as every 30 minutes throughout an 8-hour workday (as is assumed and established in the written decision as well). The inconsistent sit scenario posed in the hypothetical does not impact the analysis for the following two reasons. First, because plaintiff would be permitted to alternate between sitting and standing every 30 minutes, she would

never be required, as a practical matter, to sit for more than four hours in an 8-hour workday. Second, taking the more-than-4-hour sit scenario at face value, the issue is moot because none of the three specific occupations identified by vocational expert Kilcher require plaintiff to sit for more than 4 hours (even though the ALJ's hypothetical question assumed that she could).

While the sit clause at issue in the hypothetical was, on its own, technically inconsistent with the limitations established in the written decision, the plain language of the at-will clause allowing plaintiff to alternate between sitting and standing as regularly as every 30 minutes cures any deficiency. Further, the transcript from the administrative hearing demonstrates that the vocational expert was acutely aware of this 30 minute sit/stand requirement in recommending the three occupations presented to the ALJ. It is apparent to this Court that the vocational expert did not contemplate plaintiff being forced to sit for more than 4 hours in a workday, and clearly accounted for the 30 minute sit/stand clause in arriving at his opinions and selecting the three occupations as being suitable for plaintiff's needs and limitations. [AR at 62-63, 68-69] Therefore, this Court is satisfied that the 30 minute sit/stand option, which on its face conflicts with the more-than-4-hour sit scenario, neutralized and rendered moot any facial inconsistency. Because the 30 minute option appears in both scenarios, the RFC presented in the hypothetical and the RFC outlined in the final written decision, as a practical matter, function as the same.

In *Embrey v. Bowen*, the Ninth Circuit held that when a vocational expert provides testimony based off a hypothetical scenario, the hypothetical posed must set out all of a claimant's limitations and restrictions for the expert's testimony to be deemed reliable. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). Applying *Embrey* to the instant action, the alleged error in the hypothetical ALJ Spencer posed to vocational expert Kilcher appears harmless. Even though the hypothetical sit limitation presented to the vocational expert was, on its own, technically incorrect, there is no apparent prejudice to plaintiff as a result, given that the error was sanitized

by the plaintiff's consistently-recognized need to alternate between sitting and standing (every 30 minutes if necessary) throughout a typical workday. If plaintiff were permitted to alternate between sitting and standing every 30 minutes, a controlling clause in both the hypothetical and the written decision, an 8-hour workday for plaintiff would not entail more than 4 hours of sitting.

For all of these reasons, the issues raised by plaintiff regarding the hypothetical scenario posed to the vocational expert do not want warrant reversal or remand of defendant's final decision. Defendant sufficiently carried its burden at step 5 of the analysis. If there was any error at all, it was harmless and not the type contemplated in *Embrey*, wherein a hypothetical question posed to a vocational expert contained incomplete information (i.e. entirely without reference to certain of the plaintiff's other medically determinable and recognized limitations). This is not the case in this action.

B. The ALJ's Application of the Grids

Plaintiff alleges that the ALJ erred in his application of the medical vocational guidelines (the "Grids"). "The Grids are used to determine whether substantial gainful work exists for the claimant with respect to substantially uniform levels of impairment." *Thomas v. Barnhart*, 278 F.3d 947, 960 (9th Cir. 2002). Plaintiff contends that the ALJ's use of the light job base, as opposed to the sedentary job base, was an error. [Doc. No. 16-1, pp. 13-14] Plaintiff argues that the vocational expert "testified three times that the sedentary job base would be the most appropriate exertional base[] due to the limited standing and the sit/stand 30 minute option," and that both counsel and the ALJ at the hearing "recognized that the full range of light work was significantly reduced [and] that the application of the sedentary grid rule was an issue critical to the analysis." *Id.* at 13. Plaintiff takes specific issue with the ALJ's lack of inquiry into the "degree of erosion" to the entire light job base, as well as to the three specific jobs identified by Mr. Kilcher. *Id.* at 14. Plaintiff argues that applying a reduced light occupational base (with erosion from the full-range of the light work base reflecting plaintiff's additional limitations) instead of a sedentary base is

especially significant because plaintiff would have been found disabled under the SSA had a sedentary base been applied. *Id.*

Defendant contends that the ALJ properly considered plaintiff's additional limitations in eroding the occupational base for light work available to plaintiff, and that the ALJ reasonably relied upon the testimony of the vocational expert in finding that, even after a reduction, there were a significant number of remaining light jobs plaintiff could perform. [Doc. No. 23-1, pp. 5-6] When, as here, an individual's exertional limitations fall between the Grids because the Grids do not adequately take into account a claimant's full range of abilities and limitations, the occupational base is impacted, and this impact may or may not represent a significant number of jobs in terms of the rules directing a conclusion regarding disability. *Thomas v. Barnhart*, 278 F.3d at 960; *see* Social Security Ruling ("SSR") 83-12, *available at* 1983 WL 31253. "Where the extent of erosion of the occupational base is not clear, the adjudicator will need to consult a vocational resource." SSR 83-12, 1983 WL 31253 at *2. SSR 83-12 contemplates the exact type of scenario faced by plaintiff, specifically addressing a claimant needing to alternate at will between sitting and standing. "Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a [vocational specialist] should be consulted to clarify the implications for the occupational base." *Id.* at *4.

ALJ Spencer therefore did exactly what the Regulations, caselaw, and SSR 83-12 directed him to do–he consulted a vocational expert. The expert testified that a person with plaintiff's profile could perform substantial gainful work in the economy, identifying three light level occupations plaintiff could perform, the numbers of which were reduced to account for the sit/stand option. [AR at 62-64, 69] Even after reduction, and based on the vocational expert's testimony, the ALJ found that a significant number of jobs were available in the three occupations identified. Based on this analysis, the ALJ found that plaintiff was not disabled. "SSR 83-12 does not mandate a finding of 'disabled.' Instead, it mandates the use of a [vocational expert],

which was exactly the process used in this instance." *Moore v. Apfel*, 216 F.3d 864, 871 (9th Cir. 2000).

Plaintiff asserts that the vocational expert opined that a sedentary job base would be the most appropriate exertional base due to plaintiff's need for a 30 minute sit/stand option. Thus, plaintiff argues that the ALJ committed error in not following this alleged recommendation, or in not giving clear reasons for rejecting it. Plaintiff's argument fails, mis-characterizes the nature of vocational expert Kilcher's testimony, and misconstrues the role of the vocational expert. Mr. Kilcher qualified that application of the sedentary base was his "interpretation" of the Grids alone, since plaintiff's condition fell between the light and sedentary base options. [AR at 69-70] Vocational expert Kilcher further explained that the Grids provide no further clarity beyond the base levels, and if forced to choose between a *full range* of light base and the sedentary options, he would round down to sedentary because plaintiff's limitations simply would not fit into the full range of light base as outlined in the Grids. *Id.*

Given that vocational experts are routinely called to assist ALJs in instances where a claimant's abilities fall between the Grids, Mr. Kilcher's statements are not at all surprising. Thus, plaintiff's "all of nothing" argument is simply not practical, is clearly not what was contemplated or intended under the Regulations, and does not even appear to be what Mr. Kilcher anticipated. Mr. Kilcher did not testify that the light base had been so eroded by plaintiff's limitations that the jobs left available were insignificant in number. Taking plaintiff's logic to its natural conclusion, the process of "eroding" a base grid would never occur, as all potential erosion scenarios would be, as a matter of course, rounded down to the next base option. This approach would obviate the need to consult a vocational expert to assess and account for a claimant's abilities and limitations which otherwise fall outside of or between Grids. The caselaw, Regulations, and SSRs, however, allow and sometimes mandate that ALJs consult with vocational experts for very the purpose of analyzing erosion scenarios and identifying the type and number of occupations in existence tailored to a claimant's specific

abilities/limitations.

Furthermore, even assuming it was Mr. Kilcher's "recommendation" that the sedentary base be applied, despite the vocational expert's role as testifying expert, the ALJ, not the vocational expert, is responsible for weighing the value of all the evidence presented (including the expert testimony), determining the degree of erosion, and ultimately selecting the appropriate Grid Rule. While a vocational expert must be consulted as part of this process, it does not naturally follow that every recommendation made or interpretation advanced by the vocational expert must be adopted by the ALJ. *Thomas v. Barnhart*, 278 F.3d at 960 ("...when a claimant's exertion limitation falls between two grid rules, the ALJ fulfills his obligation to determine the claimant's occupational base by consulting a vocational expert regarding whether a person with claimant's profile could perform substantial gainful work in the economy.").

For all of these reasons, this Court finds that defendant sufficiently carried its burden at step 5 of the analysis and that the ALJ did not err in his application of the Grids. The ALJ was required to consult with a vocational expert. The expert testified that plaintiff was capable of performing substantial gainful work in the economy, identifying three light level occupations plaintiff could perform, and providing corresponding reduced numbers the ALJ found to be significant. Based on this analysis, the ALJ found that plaintiff was not disabled. The ALJ's actions were proper, and his findings are substantially supported by the administrative record. Even if Mr. Kilcher disagreed with the ALJ's refusal to select the sedentary grid option, as argued by plaintiff, this does not undercut or otherwise devalue Mr. Kilcher's other findings, namely that three light jobs exist that plaintiff can perform given all of her limitations, including the sit/stand option. Accordingly, the ALJ's application of the Grids does not warrant reversal or remand of defendant's decision denying plaintiff disability benefits.

/ / /

C. The Jobs Numbers Presented by the Vocational Expert

Plaintiff contends that the ALJ committed further error by relying on the vocational expert's testimony in arriving at the numbers of jobs nationally and regionally available for the three occupations identified as being suitable for plaintiff. Specifically, plaintiff argues that the numbers[2] presented are not supported by the other evidence adduced at the hearing, or with other sources of reliable jobs data administratively noticed and relied upon by defendant. [Doc. No. 16-1, pp. 14-21] Plaintiff asserts that the ALJ improperly considered only national numbers, and attacks the accuracy of the numbers elicited from vocational expert Kilcher, citing allegedly conflicting data from the County Business Patterns, a source published by the Bureau of Census. *Id.* at 15. Specifically, plaintiff claims the vocational expert made an aggregation error. *Id.* at 19.

Defendant argues that plaintiff's challenge of the data is untimely, and that the ALJ properly relied on the vocational expert's testimony in both accepting the numbers and in finding the numbers to be "significant." Defendant contends that plaintiff's counsel raised no objection at the hearing regarding the vocational expert's expertise and qualifications, that plaintiff failed to challenge the numbers or submit any alternative evidence from other vocational sources during or after the hearing, and failed to raise the issue with the Appeals Council on review. [Doc. No. 23-1, 7] For the first time before this Court, plaintiff now challenges the numbers provided by the vocational expert and adopted by the ALJ because they allegedly conflict with or are undercut by other sources of vocational data. Defendant asserts that this type of argument was addressed in *Gutierrez v. Commissioner of Social Security*, 740 F.3d

---

[2] From the ALJ's written opinion: "The vocational expert testified that given all of these factors the individual would be able to perform the requirements of representative occupations such as: assembler, with 400 local jobs and 120,000 national jobs; packager, with 200 local jobs and 100,000 national jobs; and garment sorter, with 250 local jobs and 125,000 national jobs. All of the numbers of these jobs reflect a reduction to the claimant's occupational base for unskilled light work due to the nonexertional limits identified in the residual functional capacity." [AR at 17 (emphasis omitted)]

519, 527 (9th Cir. 2014), when the Ninth Circuit rejected a plaintiff's after-the-fact challenge to the jobs numbers, noting that the claimant failed to challenge the vocational expert's expertise and testimony regarding the numbers during the hearing. [Doc. No. 23-1, p. 7]

Plaintiff's arguments are without merit. When the Grids do not match a claimant's qualifications, an ALJ can rely on vocational expert testimony to determine whether a claimant can still perform jobs in the national economy. *Thomas v. Barnhart*, 278 F.3d at 960; *see* SSR 83-12, *available at* 1983 WL 31253. "An ALJ may take administrative notice of any reliable job information, including information provided by a [vocational expert]. A [vocational expert's] recognized expertise provides the necessary foundation for his or her testimony." *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (citation omitted). At the time of the hearing and on appeal, plaintiff failed to challenge the credibility of the expert or the numbers provided, despite having cross-examined Mr. Kilcher during the hearing. [AR at 35, 63-70] Plaintiff fails to identify any actual error in the ALJ's reliance on the vocational expert's testimony. Rather, plaintiff offers in its Motion for Summary Judgment alternative vocational data evidence. As stated by defendant: "Plaintiff's attorney is not a vocational expert; she is merely piecing together statistics from various sources and offering her own layperson's interpretation." [Doc. No. 23-2, p. 7]

In this case, the ALJ took administrative notice of reliable jobs information, namely testimony from vocational expert John Kilcher.[3] This reliance was proper. *Bayliss*, 427 F.3d at 1218. In response to a hypothetical from the ALJ describing plaintiff's limitations, the vocational expert identified three occupations an individual with such limitations could perform. He based that determination on his own expertise,

---

[3] During the hearing, Mr. Kilcher relied on the Dictionary of Occupational Titles ("DOT"), a source published by the Department of Labor, in testifying to the three occupations at issue. [AR at 63-64] The DOT, the County Business Patterns, and 3 other publications are recognized and listed in the Regulations as being sources of reliable job data and information. *See* SSR 00-4p; 20 C.F.R. §§ 404.1566(d); 416.966(d).

as well as on the position descriptions in the Dictionary of Occupational Titles ("DOT").[4] Because the DOT provides only job descriptions and specifications, and not the actual hard numbers regarding the national and regional availability of the same, vocational experts utilize additional secondary sources to ascertain the numbers of positions that exist for each of the DOT codes identified. *Brault v. Social Security Admin.*, 683 F.3d 443, 446 (2nd Cir. 2012). These secondary sources typically correlate directly with the DOT codes. *Id.* In this case, vocational expert Kilcher does not specifically identify, during the hearing or anywhere in the overall record, which secondary source he used to provide the ALJ with the actual reduced numbers plaintiff is now challenging.

To dispute the numbers, plaintiff relies on a non-binding case from the Second Circuit, *Brault v. Social Security Administration*, *supra*, to argue that a vocational expert's testimony can be adversely impacted by the concept of data aggregation –"a many-to-one mapping, such as the one the [vocational expert] used to associate DOT titles to [a different system of codes used by a secondary source], necessarily creat[ing] information loss." *Id.* In *Brault*, a vocational expert relied upon a secondary source for jobs numbers which identified jobs using a different coding system than the DOT. The *Brault* plaintiff argued that the numbers ultimately arrived at by the vocational expert were impacted in translation by data aggregation or "inexact matching." *Id.* at 445. The Second Circuit recognized the theory as being potentially viable and possibly

---

[4] "The DOT gives a job type a specific code–for example, '295.467-026 Automobile Rental Clerk'–and establishes, among other things, the minimum skill level and physical exertion capacity required to perform that job. Because of the detailed information appended to each DOT code, the codes are useful in determining the type of work a disability applicant can perform. In fact, the DOT is so valued that a [vocational expert] whose evidence conflicts with the DOT must provide a 'reasonable explanation' to the ALJ for the conflict. The DOT, however, just *defines* jobs. It does not report how many such jobs are available in the economy." *Brault v. Social Security Admin.*, 683 F.3d 443, 446 (2nd Cir. 2012) (emphasis in original). Because the DOT does not provide the actual numbers, vocational experts often turn to additional secondary sources for this information, one such acceptable source being the Occupational Employment Quarterly III (the "OEQ"), which is prepared by a private organization called U.S. Publishing, "to assess whether positions exist for each of the [] DOT codes identified." *Id.*

having a real and significant impact on numbers produced by vocational experts. The Second Circuit reasoned, however, that the vocational expert's reliance on this secondary source did not rise to the level of reversible error because the ALJ sought and received a stipulation regarding the expert's qualifications, plaintiff's counsel challenged the numbers and raised the issue of data aggregation on its cross-examination of the expert at the hearing, and counsel was even permitted to submit supplemental briefing to the ALJ on the same issue after the hearing. "In sum, [claimant's] attorney had a full opportunity to explain his objections in significant detail. Nothing more was required." *Id.* at 451.

The crux of plaintiff's argument in the present action is that because the DOT codes do not always directly correlate with job coding systems utilized by other secondary job data sources, data can be lost in translation, leading to unreasonably inflated or deflated job numbers. Plaintiff, however, makes this argument without knowing which secondary source was utilized by vocational expert Kilcher. If plaintiff took issue with Mr. Kilcher's qualifications or the source of his jobs data, the time to raise that issue was during the hearing, shortly thereafter, or on appeal. Based on this Court's review of the administrative record, the Regulations, and the case law, the ALJ properly assessed plaintiff's limitations, determined that these limitations impacted her ability to perform the full range of light work as defined in the Grids, and obtained vocational expert testimony to identify a significant number of reduced light-level jobs she was still capable of performing with her specific limitations.

Nothing in the administrative record undercuts the ALJ's reliance on the vocational expert's testimony, and as argued by defendant, "there is no requirement that the Commissioner consult every vocational data source listed under sections 404.1566 and 416.966, compare them, and then determine whether there is available alternative work in the national economy for a claimant." [Doc. No. 23-1] While the record fails to reflect the exact secondary source the vocational expert utilized in providing the ALJ with the reduced jobs numbers, there is no requirement that the ALJ

make such an inquiry, as he was well within his discretion to rely on the expertise and testimony of the expert. *Bayliss*, 427 F.3d at 1218. Further, it is relevant that plaintiff's counsel failed to challenge the vocational expert's expertise or testimony regarding these numbers, or otherwise further explore the veracity of these figures, during the hearing before the ALJ. *See Gutierrez*, 740 F.3d at 527.

Accordingly, this Court finds that defendant sufficiently carried its burden at step 5 of the analysis. No error or unsupported finding in the administrative record or written decision has been identified or discovered. Rather, plaintiff seeks to collaterally attack the ALJ's findings with extraneous vocational data, advancing lay theories interpreting the same. This data was available to plaintiff at the time of the hearing, and on direct review to the Appeals Council. The ALJ's reliance on the testimony of vocational expert Kilcher regarding the type and number of jobs in existence plaintiff is capable of performing was proper. Nothing presented by plaintiff in her moving papers [Doc. Nos. 16, 26] warrants reversal or remand of defendant's decision denying plaintiff disability benefits.

VI. CONCLUSION

Consistent with the foregoing, the Court **RECOMMENDS** that plaintiff's Motion for Summary Judgment [Doc. No. 16] be **DENIED**, and that defendant's Cross Motion for Summary Judgment [Doc. No. 23] be **GRANTED**.

This Report and Recommendation ("R&R") is submitted to the United States District Judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties **within 14 days of being served with a copy of this R&R**. The document should be captioned "Objections to Report and Recommendation." Failure to file objections within the specified time may affect the scope of review on appeal. *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991).

Date: June 26, 2014

KAREN S. CRAWFORD
United States Magistrate Judge